MOHD ASLAM KHAN SYED GULAM v. C MAGESWARY CHANDRAN & ORS

COURT OF APPEAL, PUTRAJAYA
ABDUL RAHMAN SEBLI JCA
MARY LIM JCA
HASNAH MOHAMMED HASHIM JCA
[CIVIL APPEAL NO: B-01(NCVC)(W)-530-08-2018]
15 OCTOBER 2019

SUCCESSION: *Probate and administration – Administration of estate – Transfer of property – Administrator's action against respondents premised on acts of forgery, fraud, illegal or unlawful means to effect transfer of property – Whether there was fraud in transfer of property – Whether administrator sole beneficiary of deceased's estate – Whether administrator had necessary locus standi to bring action – Whether mandatory to obtain previous permission of court before administrator of estate could execute any transfer of estate's property – Whether interest and ownership of respondents over property defeasible, void ab initio and illegal – Whether transfer of property liable to be set aside – Probate and Administration Act 1959, s. 60(4)(a) & (6)*

LIMITATION: *Cause of action – Accrual of – Action based on fraud – Administrator's action against respondents premised on acts of fraud to effect transfer of property – Whether time for purposes of limitation begin to run only after discovery of fraud – Whether suit filed within limitation period – Whether claim time barred – Limitation Act 1953, s. 29*

TRUSTS: *Constructive trust – Administration of estate – Administrator's action against respondents premised on acts of fraud to effect transfer of property – Whether there was fraud in transfer of property – Whether respondents a purchaser in good faith for valuable consideration – Whether respondents and its beneficiaries obtained good title to property – Whether respondents held property as constructive trustee for and on behalf of deceased's estate – National Land Code, s. 340(3)*

Sikandar Fajar Ellahi ('Sikandar') was the original proprietor of a piece of land ('the property'.) Upon Sikandar's death on 2 September 1940, one Merlhat Han ('Merlhat') applied for letters of administration for Sikandar's estate and obtained the grant on 13 November 1941. On 2 March 1950, Merlhat applied for the transmission of the property to himself in his capacity as representative. Merlhat died on 4 September 1952, leaving the estate unadministered. On 29 May 2001 (almost 50 years after his death), Merlhat purportedly transferred the property to one Chandaran Narayanasamy ('Chandaran') who passed away on 6 March 2002. On 26 April 2016, the property was transmitted to one Annapoorany Letchumanan ('Annapoorany'). On 1 February 2017, 13/15 part of the property was transmitted to one Mageswary Chandran and 2/15 part was transferred to one Sundara Rajan ('the sixth respondent') as trustee. The

appellant, acting as administrator for Sikandar's estate, commenced action against all the respondents. The appellant's cause of action was premised on acts of forgery, fraud, illegal and/or unlawful means using void and/or insufficient instruments to effect the transfer of the property to Chandaran. The appellant contended that (i) the interest and ownership of the respondents over the property was defeasible, void *ab initio*, illegal and should be set aside; and (ii) the respondents were at all material times holding the property on trust as constructive trustees on behalf of Sikandar's estate. The trial judge, in dismissing the appellant's claim, found that fraud had not been proved by the appellant on the balance of probabilities and that in any event, the appellant's claim was time barred. Hence, this appeal. The issues that arose were whether the trial judge erred in holding that (i) the appellant's action was barred by limitation; (ii) the appellant lacked *locus standi* to bring this action; (iii) the transfer of the property to Chandaran was not tainted with fraud and/or illegality; and (iv) that Chandaran's title to the property was indefeasible.

Held (allowing appeal; entering judgment for appellant)
Per Abdul Rahman Sebli JCA delivering the judgment of the court:

(1) Section 29 of the Limitation Act 1953 ('Limitation Act') is clear, that where the action is based on fraud, the period of limitation 'shall not begin to run until the plaintiff has discovered the fraud.' Herein, there was fraud in the transfer of the property based on the fact that Merlhat died on 4 September 1952 and could not therefore have transferred the property to Chandaran on 29 May 2001. A Presumption of Death Order had provided proof that Merlhat had passed away. The Presumption of Death Order had not been set aside and therefore, it remained a valid and binding order on all parties. (paras 18-24)

(2) Once a presumption of death order is granted, it is for the person asserting otherwise to prove that the person is alive. In this regard, the respondents failed to produce any evidence to prove that Merlhat was still alive in 2001, the year he purportedly transferred the property to Chandaran. Proof of Merlhat's death had also been established by the issuance of the grant of letters of administration. The *de bonis* grant clearly stated that Merlhat's date of death was 4 September 1952. (paras 24 & 25)

(3) The appellant had only discovered the fraud on or about 11 March 2016 when he conducted a land search at the land office, which showed that Chandaran was registered as proprietor of the property. Therefore, the present suit, which was filed on 2 December 2016, was within the suspended limitation period prescribed by s. 29 of the Limitation Act. Although the appellant had knowledge of his beneficial interest in the property since 1952, time for purposes of the Limitation Act did not begin to run until after the fraud was discovered. (paras 26 & 27)

(4) The appellant had no reasonable suspicion of any fraudulent activity on the property as it was registered in the name of Merlhat as representative of Sikandar's estate, and Merlhat had passed away on 4 September 1952. The law does not place the onus on an innocent party to constantly be on the lookout for fraudulent dealings where there was no reason to suspect fraud. (para 28)

(5) The appellant was the sole beneficiary of Sikandar's estate and therefore had the necessary *locus standi* to bring this action. In any event, it was never put to the appellant that he was not the lawful grandson of Sikandar. The appellant had obtained the grant of the letters of administration *de bonis*. From the documents, the appellant's name and age was clearly spelt out in the petition for the letters of administration and the name and age corresponded with the name and age of the appellant. (paras 29-31)

(6) Under s. 60(4)(a) and (6) of the Probate and Administration Act 1959, it is mandatory to obtain the previous permission of the court before an administrator of an estate can execute any transfer of the estate's property failing which the transfer 'shall be voidable at the instance of any person interested in the property.' Since there was no previous permission of the court for the transfer of the property, the purported transfer of the property from Merlhat to Chandaran, if at all it took place, was void and liable to be set aside. Chandaran's title to the property was a result of insufficient or void instruments and was therefore defeasible, being tainted with fraud. (paras 32-34)

(7) The first, second and fifth respondents on their part provided no proof that Chandaran was a purchaser in good faith for valuable consideration. In any event, s. 340(3) of the National Land Code had no application as Chandaran was an immediate purchaser. Therefore, neither Chandaran nor his beneficiaries obtained good title to the property from the beginning. In the premises, Chandaran was holding the property as constructive trustee for and on behalf of the appellant. (paras 35 & 36)

Case(s) referred to:

Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case [1995] 3 CLJ 639 CA ***(refd)***

Eagleburgmann (Malaysia) Sdn Bhd v. Fabina Properties Sdn Bhd & Ors [2015] 1 LNS 872 HC ***(refd)***

Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd [2010] 8 CLJ 775 CA ***(refd)***

Kamarulzaman Omar & Ors v. Yakub Husin & Ors [2014] 1 CLJ 987 FC ***(refd)***

L Aruul S Lurthusamy v. Ringganazall Ponnigilee & Anor [2017] 3 CLJ 546 CA ***(refd)***

Mahendar Sucha Singh & Anor v. Emile Joseph [2000] 6 CLJ 257 HC ***(refd)***

Re Osman Bachit [1997] 2 CLJ Supp 269 HC ***(refd)***

Tan Ying Hong v. Tan Tian San & Ors [2010] 2 CLJ 269 FC ***(refd)***

Veerapan Mottaian v. Kanni Marial Arulapan [2016] 1 LNS 1040 HC ***(refd)***

Zaharah A Kadir v. Ramunia Bauxite Pte Ltd & Anor [2011] 1 LNS 1015 CA ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 90, 108
Limitation Act 1953, ss. 6(1)(a), 9, 29
National Land Code, s. 340(3)
Probate and Administration Act 1959, s. 60(4)(a), (6)

For the appellant - Krishna Dallumah, Venka Arun & Carly Yap; M/s Ven & Assocs
For the 1st, 2nd & 5th respondents - M Manoharan; M/s M Manoharan & Co
For the 3rd & 4th respondents - Nik Haize Azlin Nabidin; State Legal Advisor, Selangor

[Editor's note: For the High Court judgment, please see Mohd Aslam Khan Syed Gulam v. C Mageswary Chandran & Ors [2018] 1 LNS 1785 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli JCA:

[1] We allowed this appeal by a unanimous decision after hearing arguments by both sides. We set aside the decision of the High Court and entered judgment for the appellant in terms of para. 39 of the statement of claim except for paras. (t) and (u). These are the grounds of our decision.

[2] The facts are as follows. Sikandar s/o Fajar Ellahi ("Sikandar") was the original proprietor of a piece of land held under GM2235 Lot 1208 Mukim Kelanang, District of Kuala Langat (previously held under GM537 Lot 1208 Mukim Kelanang, District of Kuala Langat) ("the property").

[3] Upon Sikandar's death on 20 September 1940, one Merlhat Han s/o Ramlhat Han ("Merlhat") applied for letters of administration for Sikandar's estate and obtained the grant on 13 November 1941.

[4] On 2 March 1950, Merlhat applied for the transmission of the property to himself in his capacity as representative. Merlhat died on 4 September 1952, leaving the estate unadministered.

[5] On 29 May 2001 (almost 50 years after his death), Merlhat purportedly transferred the property to one Chandaran a/l Narayanasamy ("Chandaran"). Chandaran passed away on 6 March 2002.

[6] On 26 April 2016, the property was transmitted to one Annapoorany a/p Letchumanan ("Annapoorany").

[7] On 1 February 2017, 13/15 part of the property was transmitted to one Mageswary a/p Chandran and 2/15 part was transferred to one Sundara Rajan a/l Muniandy (the sixth respondent) as trustee.

[8] The appellant, acting as administrator for Sikandar's estate, commenced action against all the respondents but in the case of the third and fourth respondents, they were named as parties for the sole purpose of carrying out any order that the court might give in relation to the case.

[9] The appellant's cause of action was premised on acts of forgery, fraud, illegal and/or unlawful means using void and/or insufficient instruments to effect the transfer of the property to Chandaran due to the following:

(i) Merlhat had died on 4 September 1952. Therefore, it was impossible for him to have effected the transfer of the property to Chandaran on 29 May 2001;

(ii) Merlhat being an administrator would have to obtain the previous permission of the court to deal with or to transfer the property. However, no such permission or order was given;

(iii) Merlhat's IC number on the instrument of transfer (Form 14A) was non-existent.

[10] The appellant therefore contended that:

(i) the interest and ownership of the respondents over the property is defeasible, void *ab initio*, illegal and should be set aside; and

(ii) the respondents were at all material times holding the property on trust as constructive trustees on behalf of Sikandar's estate.

[11] At the conclusion of the trial, the learned trial judge dismissed the appellant's claim with costs. It was his finding that fraud had not been proved by the appellant on the balance of probabilities and that in any event the appellant's claim was time barred. The appellant's appeal was grounded on the following complaints:

(i) The learned trial judge erred in holding that the appellant's action is barred by limitation;

(ii) The learned judge erred in holding that the appellant lacked *locus standi* to bring this action;

(iii) The learned trial judge erred in holding that the transfer of the property to Chandaran was not tainted with fraud and/or illegality;

(iv) The learned trial judge erred in holding that Chandaran's title to the property is indefeasible.

[12] On the first issue of limitation, the learned trial judge's finding was that the appellant had been indolent since 1952 to recover the property and therefore the claim is barred by limitation. This is what the learned trial judge said at para. [42] of his grounds of judgment:

> [42] To determine the issue at hand. PW1's evidence on when he discovered the alleged fraudulent transfer has to be scrutinised. According to PW1's version, Merlhat informed PW1 in 1952 that PW1 was his grandson and had rights to the former's property in Kuala Langat but it would appear that PW1 did nothing about it since then until the commencement of this suit.

[13] In para. [44], the learned judge referred to *Mahendar Sucha Singh & Anor v. Emile Joseph* [2000] 6 CLJ 257; [2000] 7 MLJ 691 for the proposition that where the defendant relies on the defence of limitation and there is nothing before the court to suggest that the plaintiff can escape from it, the claim must necessarily fail.

[14] Section 29 of the Limitation Act 1953 ("the Limitation Act") provides as follows:

> Postponement of limitation period in case of fraud or mistake
>
> 29. Where, in the case of any action for which a period of limitation is prescribed by the Act, either:
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or mistake, as the case may be, or could with reasonable diligence have discovered it:

[15] The learned trial judge referred to this provision but without considering whether it applied to the facts of the case. Instead, His Lordship focused his mind on ss. 6(1)(a) and 9 of the Limitation Act and went on to say:

> [41] It is trite law that the strict and mandatory provisions of s. 6(1)(a) and s. 9 of the LA ought to be given effect to and cannot be circumvented in the case of an indolent Plaintiff who sleeps on his rights for an inordinate length of time, which the defence alleged occurred in the case of the present Plaintiff.

[16] In taking this view, the learned judge relied on the following passage in the High Court case of *Veerapan Mottaian v. Kanni Marial Arulapan* [2016] 1 LNS 1040; [2016] MLJU 892 where Yeoh Wee Siam J (as she then was) said:

> It is obvious that the Plaintiff was sleeping on his rights since 1988. The strict provisions of s. 6(1)(a) and s. 9 of LA ought to be given effect, and not be bent and stretched to validate a claim which is filed 28 years after the cause of action, or the right to recovery of the land, has arisen. Clearly, the law cannot assist the indolent.

[17] With due respect to the learned judge, we must say at the outset that his reliance on the case is misconceived for the simple reason that it was not a case on s. 29 of the Limitation Act. For the same reason, his reliance on *Mahendar Sucha Singh* (*supra*) is likewise misconceived.

[18] Section 29 of the Limitation Act is clear, that where the action is based on fraud of the defendant, the period of limitation "shall not begin to run until the plaintiff has discovered the fraud." Thus, the question for the learned trial judge to consider was whether there was fraud and if so, when was the fraud discovered.

[19] Was there fraud in the transfer of the property? We think so, based on the fact that Merlhat died on 4 September 1952 and could not therefore have transferred the property to Chandaran on 29 May 2001. Marlhat's death had been established through the following documentary evidence:

(i) the presumption of death order issued by the High Court which states that Merlhat died on 4 September 1952;

(ii) Merlhat's death certificate showing that he had passed away since 4 September 1952.

[20] The learned trial judge however ruled that Marlhat's death had not been proved, for the following reasons:

(a) The presumption of death order does not prove the date of death: *Re Osman Bachit* [1997] 2 CLJ Supp 269; [1997] 4 MLJ 445; and

(b) Merlhat's death certificate could not be admitted in evidence pursuant to s. 90 of the Evidence Act 1950.

[21] We agree with learned counsel for the appellant that the learned trial judge erred in holding that the presumption of death order had no evidential value and did not provide proof that Merlhat died on 4 September 1952. With due respect to the learned judge, his reliance on *Re Osman Bachit* is misplaced as in that case, the presumption of death order had not been obtained, unlike the present case where the order had been procured. Besides, it was a case on s. 108 of the Evidence Act 1950.

[22] Contrary to the learned trial judge's reading of the case, *Re Osman Bachit* is in fact authority for saying that the date of death could be proven in an application for the grant of letters of administration. This is clear from the learned judge's observation at p. 274 (CLJ); p. 450 (MLJ):

> in my opinion, the proper course for the appellant to adopt would be to apply for letters of administration and prove the death of the deceased in that proceedings.

[23] The presumption of death order has not been set aside. Therefore, it remains a valid and binding order on all parties: *Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd* [2010] 8 CLJ 775; [2010] 5 MLJ 34; *L Aruul S Lurthusamy v. Ringganazall Ponnigilee & Anor* [2017] 3 CLJ 546; [2017] 2 MLJ 51 CA. The order provides conclusive proof that Merlhat had died on 4 September 1952.

[24] Once a presumption of death order is granted, it is for the person asserting otherwise to prove that the person is alive. In this regard, the respondents failed to produce any evidence to prove that Merlhat was still alive in 2001, the year he purportedly transferred the property to Chandaran.

[25] Proof of Merlhat's death had also been established by the issuance of the grant of letters of administration. The *de bonis* grant clearly states that Merlhat's date of death is 4 September 1952.

[26] The question that follows is, when did the appellant discover the fraud? The appellant's case was that he only discovered the fraud on or about 11 March 2016 when he conducted a land search at the Land Office, which showed that Chandaran was registered as proprietor of the property. This crucial part of the appellant's evidence was not challenged at all in cross examination and is therefore deemed to be admitted: *Aik Ming (M) Sdn Bhd & Ors v. Chang Ching Chuen & Ors And Another Case* [1995] 3 CLJ 639; [1995] 2 MLJ 770.

[27] Therefore the present suit, which was filed on 2 December 2016, was within the suspended limitation period prescribed by s. 29 of the Limitation Act. Although the appellant had knowledge of his beneficial interest in the property since 1952, time for purposes of the Limitation Act did not begin to run until after the fraud was discovered.

[28] The appellant had no reasonable suspicion of any fraudulent activity on the property as it was registered in the name of Merlhat as representative of Sikandar's estate, and Merlhat had passed away on 4 September 1952. The law does not place the onus on an innocent party to constantly be on the lookout for fraudulent dealings where there is no reason to suspect fraud.

[29] With regard to the issue of *locus standi*, we found the evidence to be clear that the appellant is the sole beneficiary of Sikandar's estate and therefore had the necessary *locus standi* to bring this action. In any event, it was never put to the appellant that he is not the lawful grandson of Sikandar.

[30] The appellant obtained the grant of the letters of administration *de bonis non* dated 27 January 2016 for Sikandar's estate *vide* Petition No: 31NCVC-588-12 at the Shah Alam High Court which was premised on the petition for letters of administration by Merlhat dated 20 June 1941 and the grant of letters of administration dated 13 November 1941 obtained by Merlhat. The first, second and fifth respondents did not file any proceedings to set aside or revoke the grant.

[31] From the documents, the appellant's name and age, six, is clearly spelt out in the petition for the letters of administration and the name and age correspond with the name and age of the appellant. The learned trial judge was therefore wrong in holding that the appellant had no *locus standi* to bring this action.

[32] It was also the appellant's pleaded case that there was no previous permission from the court for the transfer of the property by Merlhat to Chandaran. This was completely overlooked by the learned trial judge. Under s. 60(4)(a) and (6) of the Probate and Administration Act 1959, it is mandatory to obtain the previous permission of the court before an administrator of an estate can execute any transfer of the estate's property failing which the transfer "shall be voidable at the instance of any person interested in the property."

[33] Since there was no previous permission of the court for the transfer of the property, the purported transfer of the property from Merlhat to Chandaran, if at all it took place, is void and liable to be set aside.

[34] The appellant had also pleaded the issue of constructive trustee but this too was completely overlooked by the learned trial judge, probably due to his finding that Chandaran had good title to the property. It is clear that Chandaran's title to the property was a result of insufficient or void instruments and is therefore defeasible, being tainted with fraud.

[35] The first, second and fifth respondents on their part provided no proof that Chandaran was a purchaser in good faith for valuable consideration. In any event s. 340(3) of the National Land Code has no application as Chandaran was an immediate purchaser: *Tan Ying Hong v. Tan Tian San & Ors* [2010] 2 CLJ 269; [2010] 2 MLJ 1 FC.

[36] Therefore, neither Chandaran nor his beneficiaries obtained good title to the property from the beginning: *Kamarulzaman Omar & Ors v. Yakub Husin & Ors* [2014] 1 CLJ 987; [2014] 2 MLJ 768; *Zaharah A Kadir v. Ramunia Bauxite Pte Ltd & Anor* [2011] 1 LNS 1015; [2012] 1 MLJ 192; *Eagleburgmann (Malaysia) Sdn Bhd v. Fabina Properties Sdn Bhd* [2015] 1 LNS 872; [2015] MLJU 760. In the premises, Chandaran was holding the property as constructive trustee for and on behalf of the appellant.

[37] It was for all the reasons aforesaid that we allowed the appeal and entered judgment for the appellant. Cost of RM50,000 here and below was awarded to the appellant subject to payment of the allocator fee.